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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 548-549

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY, A CORPORATION, PETITIONER,

VS.

MARGUERITE W. KEYES, RESPONDENT.

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY, A CORPORATION, PETITIONER,

VS.

MARGUERITE KEYES, INCORPORATED, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT IN EACH OF THE ABOVE ENTITLED CASES.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT IN EACH OF THE ABOVE ENTITLED CASES.

To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner The Columbian National Life Insurance Company petitions for a writ of certiorari to the

Circuit Court of Appeals for the Eighth Circuit to review its decision in each of the cases, The Columbian National Life Insurance Company vs. Marguerite W. Keyes, and The Columbian National Life Insurance Company vs. Marguerite Keyes, Incorporated (Tr. p. 280) (not yet reported), affirming the separate judgments in each of said cases entered by the District Court of the United States for the Western Division of the Western District of Missouri.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

On May 28, 1942, respondent Marguerite W. Keyes filed suit against your petitioner on a $25,000 policy of insurance issued by your petitioner on the life of her husband, George T. Keyes, in October, 1940. She sought recovery for the face of the policy, plus interest and plus statutory penalties and attorneys' fees under the statutes of the State of Missouri (Tr. 53-65).

On the same date, May 28, 1942, respondent Marguerite Keyes, Incorporated, filed suit against your petitioner on a $10,000 life insurance policy issued by your petitioner in June, 1941, on the life of said George T. Keyes (Tr. 29, 217).*

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*A third suit was filed at the same time, but that policy was not a binding receipt policy and, by its terms, became a binding contract upon delivery to assured in Missouri. After the District Court ruled on the combined motions to strike and for judgment on the pleadings, the Supreme Court of Missouri, in *Edwards* v. *Business Men's Assurance Co.*, 168 S. W. 2d 82, ruled on the only defense pleaded by your petitioner against your petitioner, whereupon your petitioner tendered the face of that policy, plus interest and costs. Since the only issue in that third case turns upon a review of the evidence and the sufficiency thereof to show vexatious refusal to pay, your petitioner is not petitioning for writ of certiorari in that third case. The District Court very properly found in that case that the policy had been delivered to the assured in Missouri (Tr. 13, Finding II).

On December 11, 1942, your petitioner filed its second amended answer in each of said cases (Tr. 91-96). The defense pleaded in each answer was that the assured in each of said policies of insurance, George T. Keyes, had committed suicide within two years from the date of the policy, thus, under a specific provision in each policy, limiting your petitioner's liability to the amount of the reserve under each policy.

The respondent in each of said cases, on the same date, filed in each of said cases a combined motion to strike from your petitioner's second amended answers all of the allegations in each of your petitioner's second amended answers relating to or connected with its defense of suicide and for judgment on the pleadings.

On January 27, 1943, the District Court entered an order and judgment in each case, sustaining respondents' combined motion in each case and for judgment on the pleadings and adjudging that the plaintiff (respondent) recover from the defendant (your petitioner) in the case of *Marguerite W. Keyes* v. *The Columbian National Life Insurance Company*, the sum of $25,000 with interest thereon and the further sum of $2,500 as a penalty for vexatious refusal to pay, and the further sum of $5,000 as and for attorneys' fees (Tr. pp. 27-28), and adjudging in the case of *Marguerite Keyes, Incorporated*, v. *The Columbian National Life Insurance Company* that the plaintiff (respondent) have and recover from the defendant (your petitioner) the sum of $10,000 with interest thereon, and the further sum of $1,000 as a penalty for vexatious refusal to pay, and for the further sum of $2,000 as and for attorneys' fees (Tr. p. 30).

The answers in the two cases are, *mutatis mutandis*, identical. The facts pleaded in each answer as well as all inferences reasonably to be drawn therefrom were, and are, by the combined motion to strike and for judgment on the pleadings, conceded to be true.

The facts stricken from the answers (except the denials of allegations in the petitions contained in the parts

stricken) by the District Court on respondent's combined motions to strike and for judgment on the pleadings are substantially as follows: The two policies sued on, except as to the dates of issue, the amounts of insurance provided and the names of the beneficiary, are identical (Tr. pp. 57-205), and are what is known as binding receipt policies.

The assured committed suicide, dying on the 10th day of April, 1942, from gun shot wounds, suicidally inflicted on or about March 23, 1942.

The policies sued on were Massachusetts contracts, made, issued, executed and delivered by your petitioner to the assured therein, George T. Keyes, in the State of Massachusetts.

At the time of the execution by said George T. Keyes of the applications for the policies, George T. Keyes paid the first premiums thereon. Coincident with the execution of the application for each policy by said George T. Keyes, your petitioner executed and delivered to said George T. Keyes its binding receipt for said first premium, which binding receipt was accepted by said George T. Keyes and in the Marguerite Keyes, Incorporated, case by that Company also and "which binding receipt was a part of the contract of insurance, and which, until torn off the said application and delivered to said George T. Keyes, was physically a part of said application."

Each binding receipt provided that The Columbian National Life Insurance Company had received from said George T. Keyes the first premium on a proposed insurance as of the date of the application therefor, and further provided for such insurance to be in force from the date of the completion of Part II of the examination in said application (the personal statements made by said George T. Keyes and recorded by your petitioner's medical examiner), provided, however, that your petitioner, at its home office in Boston, Massachusetts, should be satisfied that on said date the applicant, George T. Keyes,

was insurable in accordance with your petitioner's rules, at standard rates, and should approve said insurance for the amount and on the plan applied for without modification, and further provided that such approval by your petitioner should constitute, in effect, a delivery of the policy (Tr. p. 92).

Your petitioner when it received said applications at its home office in Boston, Massachusetts, being satisfied that on the date of the completion of Part II of said applications, said George T. Keyes was insurable according to its rules at standard rates, approved the insurance in each case for the amount and on the plan applied for without modification. Such approval was the last act necessary to make the contracts of insurance binding and completed contracts, and this last act having been performed in the State of Massachusetts, the contracts of insurance sued on were, in fact, Massachusetts contracts.

Each policy of insurance provides:

> "Death within two years from date of policy from suicide, while sane or insane, shall reduce the company's liability hereunder to the amount of the reserve hereon."

The amount of the reserve on the policy in each case was tendered to the plaintiff therein and paid to the Clerk of the District Court for the use and benefit of the plaintiff therein (Tr. p. 94).

Each application for the proposed insurance contained a provision that any policy issued thereon should be considered a Missouri contract and construed in accordance with the law of Missouri unless otherwise specified by the applicant. Under the law and public policy of Massachusetts, suicide is a very wicked crime and it is against the law and public policy of the State of Massachusetts to pay life insurance benefits on account of death produced by suicide. The contracts sued upon being Massachusetts

contracts, and therefore to be construed in accordance with the laws of the State of Massachusetts, and the insured in each policy, George T. Keyes, having committed suicide within two years from the respective dates of the contracts of insurance, the provision in the policies limiting the liability of your petitioner to the reserve on each contract was valid and enforceable (Tr. pp. 94, 241, 242).

The contracts of insurance sued upon being Massachusetts contracts, the provision in the applications that they should be considered and construed as Missouri contracts was unenforceable and of no effect because to so construe them and to write into them the Missouri suicide statute would be against the law and public policy of the State of Massachusetts, which law and public policy were a part of the contract and governed the construction to be placed upon their terms and conditions (Tr. pp. 94, 95, 242, 243).

Each policy of insurance sued upon provided that it was to be performed at Boston, Massachusetts (Tr. pp. 57, 205).

In each of its answers, your petitioner denied generally that its refusal to pay was vexatious or that it was liable for the Missouri statutory penalties for vexatious refusal to pay (Tr. p. 93).

The District Court did not find that either of the policies sued upon in these two cases was delivered to George T. Keyes in the State of Missouri. In the case of *Marguerite W. Keyes, plaintiff,* v. *The Columbian National Life Insurance Company, defendant,* the District Court found that the policy there involved was "delivered to George T. Keyes, the insured, while he was a resident of the State of Missouri" (Tr. p. 10, Finding of Fact 2). In the case of *Marguerite Keyes, Incorporated,* v. *The Columbian National Life Insurance Company,* no place of delivery of the policy was found by the District Court, the finding of the District Court in that regard being that the policy was delivered to Markay, Incorporated, a Mis-

souri corporation, and its successor, Marguerite Keyes, Incorporated (Tr. p. 16, Finding of Fact 2).

JURISDICTION.

The jurisdiction of this court is invoked by your petitioner for writs of certiorari under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 938 (Title 28, U. S. C. A., Sec. 347), and under the same act, Ch. 229, Sec. 8, 43 Stat. 940 (Title 28, U. S. C. A., Sec. 350), and under *Ruhlin* v. *New York Life Insurance Company*, 304 U. S. 302, 58 S. Ct. 860, 82 L. Ed. 1920.

The Date of the Judgment to Be Reviewed.

The judgment of the Circuit Court of Appeals in each case affirming the judgment in each case of the District Court with an order of remittitur of attorneys' fees was entered on the 25th day of October, 1943 (Tr. pp. 287, 289); rehearing denied November 16, 1943 (Tr. p. 307).

QUESTIONS PRESENTED.

I.

Where an applicant for insurance policies, a resident of Missouri, executes applications for such policies in the State of Missouri, and at the time of the execution of such applications pays the first premiums upon the proposed insurance to the agent of the insurance company, and where coincidentally with the execution of said applications and the payment of said first premiums, the applicant accepts binding receipts executed by the insurance company and delivered by the insurance company to such applicant, which binding receipts acknowledge the receipt of the first premiums on the proposed insurance on a specified plan and provides that the insurance applied for shall be in force from the date of such appli-

cations, provided that the insurance company, at its home office in Boston, Massachusetts, shall be satisfied on said date that such applicant was insurable in accordance with its rules at standard rates, and shall approve, for the amount and on the plan applied for without modification, and which binding receipt further provides that such approval shall constitute, in effect, a delivery of the policy, and where, upon receipt of said applications at its home office in Boston, Massachusetts, said insurance company is satisfied that on the date of the execution of the applications the applicant was insurable in accordance with its rules at standard rates and approves for the amount and on the plan applied for without modification, and after such approval mails the policies issued on such applications to its agent in Missouri for unconditional delivery to the applicant, did not the contracts, upon such approval and at the place of such approval, to-wit, Boston, Massachusetts, become binding contracts, and are not such contracts Massachusetts contracts?

II.

Is not the place where the final act occurs which makes a binding contract the place of contract?

III.

Must not questions of interpretation of contracts and the validity thereof be determined by the law of the state where the contracts were made?

IV.

Is not the Missouri Suicide Statute, Sec. 5851, R. S. Mo., 1939, reading:

> "In all suits upon policies of insurance on life hereafter issued by any company doing business in this state, to a citizen of this state, it shall be no defense that the insured committed suicide, unless it shall be shown to the satisfaction of the court or

> jury trying the cause, that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void."

wholly inapplicable in a suicide case, in interpreting and determining the validity and legal effect of a contract made in the State of Massachusetts?

V.

If a contract of insurance is a Massachusetts contract, the last act necessary to making it a binding contract having occurred in Massachusetts, and if such contract contains the provision that it shall be considered a Missouri contract, and that its terms shall be construed in accordance with the laws of the State of Missouri, and if it is against the public policy of Massachusetts to allow or permit a recovery upon such contract of insurance, is not such a provision that the contract shall be considered a Missouri contract and construed in accordance with the the laws of Missouri void and unenforceable where the insured in such contract of insurance commits suicide?

VI.

Is not a provision in a Massachusetts contract of insurance, reading:

> "Death within two years from date of policy from suicide, while sane or insane, shall reduce the company's liability hereunder to the amount of the reserve hereon"

valid and enforceable in the courts of Missouri and in the Federal Courts in Missouri notwithstanding the Missouri Suicide Statute (Sec. 5851, R. S. Mo., 1939) set out above in "Question Presented IV"?

VII.

Is not the specific provision in these contracts, which were made and executed in Massachusetts and became binding contracts in that State, and are, therefore, Massachusetts contracts, reading:

> "Death within two years from date of policy from suicide, while sane or insane, shall reduce the company's liability hereunder to the amount of the reserve hereon"

controlling over a general provision in the contracts, reading:

> "Any policy of insurance issued upon this application shall be considered a Missouri contract and its terms shall be construed in accordance with the laws of the State of Missouri unless otherwise specified herein by the applicant"

and is not such specific provision in such Massachusetts contracts valid and enforceable notwithstanding such general provision in the contracts, and therefore notwithstanding the Missouri Suicide Statute, Sec. 5851, R. S. Mo., 1939?

VIII.

Can the beneficiaries in contracts of insurance made in Massachusetts, and therefore Massachusetts contracts, recover from the insurance company making such contracts statutory penalties and attorneys' fees provided for by Sec. 6040, R. S. Mo., 1939, reading:

> "In any action against any insurance company to recover the amount of any loss under a policy of * * * life * * * insurance, if it appears from the evidence that such company has vexatiously refused to pay such loss, the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not to exceed ten per cent on the amount of the loss and a reasonable attorney's fee; * * *"?

IX.

Can a statement of fact by a Circuit Court of Appeals in its opinion, which has no support in the findings of fact by the District Court, and which is contrary to all of the conceded and admitted facts in the record, receive any consideration or be given any effect by this Court in considering a petition for writs of certiorari and in considering and determining the merits of the cases?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRITS.

I.

The Circuit Court of Appeals held "We find no merit in the plea that construction of the insurance contracts was controlled by Massachusetts law.

This holding is in conflict with the following decisions of the Supreme Court of Missouri:

Daggett v. Kansas City Structural Steel Company, 334 Mo. 207, 65 S. W. 2d 1036;

Ruhe v. Buck, 124 Mo. 178, 27 S. W. 412;

State ex rel. Equitable Life Assurance Society of the United States v. Robertson et al., Judges, 191 S. W. 989 (not officially reported);

Bearup v. Equitable Life Assurance Society of the United States, 172 S. W. 2d 942 (not yet officially reported);

Illinois Fuel Co. v. Mobile & O. R. Co., 319 Mo. 899, 8 S. W. 2d 834;

and with the following decisions of the courts of appeal of the State of Missouri:

Rowland v. Missouri State Life Insurance Company, 48 S. W. 2d 31 (not officially reported);

Pickett v. Equitable Life Assurance Society of the United States, 27 S. W. 2d 452 (not officially reported);

Fields v. Equitable Life Assurance Society of the United States, 118 S. W. 2d 521 (not officially reported);

and is also in conflict with Mutual Life Insurance Company of New York v. Liebing, 259 U. S. 209, 42 S. Ct. 467, 468.

Under the conceded facts the last acts necessary to make these contracts binding contracts occurred in Boston, Massachusetts. Therefore, the contracts were and are Massachusetts contracts.

In *Daggett* v. *Kansas City Structural Steel Company*, 334 Mo. 207, 65 S. W. 2d 1036, 1039, the Supreme Court of Missouri said:

> "It is settled law that the place where the final act occurs which makes a binding contract is the place of contract."

In the case of *Bearup* v. *Equitable Life Assurance Society of the United States*, 172 S. W. 2d 942, the policy of insurance involved was a life policy with a double indemnity provision in the event of accidental death. The insured committed suicide while insane. Under the law of New York, an insane suicide was not an accident. Under the law of Missouri, an insane suicide was an accident. In that case, a binding receipt, substantially similar to the binding receipts in the cases at bar, was executed by the insurance company, delivered to the insured, and accepted by him. The ruling of the Supreme Court is concisely stated in paragraphs 6 and 7 of the syllabi, as follows:

> "6. Parties may lawfully contract as to place of acceptance and the effective date of contract of insurance.
>
> "7. Where parties agreed life policy should take effect as of date of receipt issued for first premium payment provided application taken in Missouri was accepted by insurer's authorized officers in New York, the insurance contract completed by acceptance of ap-

plication was a New York contract governed by New York law that death by suicide while sane or insane is not accidental death. Mo. R. S. A., Sec. 5851."

In the case of *Fields* v. *Equitable Life Assurance Society of the United States*, 118 S. W. 2d 521, the policy had been applied for by a citizen of Missouri in the State of Missouri. A binding receipt, in substance similar to the binding receipts in these cases, was delivered to the insured and accepted by him at the time of the signing of the application. The policy contained the usual provision relieving or restricting the company's liability in the event of suicide. The insured committed suicide. The defense of the insurance company was predicated upon the provision relieving it from liability in the event of suicide, the insurance company contending that under the binding receipt the contract was a New York contract, governed by the laws of New York, under which the provision against suicide was recognized as a valid defense. Plaintiff contended that the contract was a Missouri contract, to be construed under the laws of Missouri. In ruling against the contention of the plaintiff, the Kansas City Court of Appeals said, on page 524 of its opinion:

"For the protection of our citizens we have attempted by law to vouchsafe to our citizens who do business with foreign companies organized to do business in this state the same rights as they have when doing business with a company chartered in Missouri. *However, it is the law of this state, when the question is duly raised, that the law of the state wherein the last act necessary to create the contract and give it legal effect as a contract is performed is the law by which issues growing out of the contract is to be determined.* * * *

"In the case at bar the first installment of premium was paid when the application for insurance was made and a 'binding receipt' was issued to the applicant. * * *

"It will be noted that the place of acceptance is in the state of New York, and further that said ac-

ceptance is the last act necessary to complete the contract. From and after said acceptance the contract is in full force and effect and same is true although policy is not then issued or delivered. Without the issuance of a policy or without the delivery of the policy the acceptance creates a completed contract that can be enforced by the courts of this state" (Emphasis ours).

To the same effect are the cases of *Rowland* v. *Missouri State Life Insurance Company,* 48 S. W. 2d 31, 33, 34; *Illinois Fuel Co.* v. *Mobile & Ohio R. Co.,* 8 S. W. 2d 834, 838, and *Pickett* v. *Equitable Life Assurance Society of the United States,* 27 S. W. 2d 452, 454, and *Mutual Life Ins. Co.* v. *Liebing,* 259 U. S. 209, 42 S. Ct. 467, 468.

This Pickett case was a binding receipt case and the Court, after discussing the effect of an unconditional acceptance of the application thereunder, said:

> "We think, therefore, that there can be no doubt that the contract was consummated in New York, and is to be governed by the laws of that state."

In *Ruhe* v. *Buck,* 124 Mo. 178, 183, 27 S. W. 412, the Supreme Court of Missouri said:

> "Matters bearing upon the execution, interpretation, and the validity of a contract are determined by the law of the place where the contract is made."

II.

This holding of the circuit court of appeals, "we find no merit in the plea that construction of the insurance contracts was controlled by Massachusetts law," is in conflict also with the following decisions of the Supreme Court of Missouri:

Prentiss v. Illinois Life Ins. Co., 225 S. W. 2d 695, 705 (not officially reported);

Parker v. Aetna Life Insurance Company, 289 Mo. 42, 232 S. W. 708, and

Lukens v. International Life Insurance Company, 269 Mo. 574, 191 S. W. 418.

Under the law of Missouri, as announced in the cases cited under the first reason assigned for the allowance of the writs, *supra*, and under the decisions of this Court, these contracts were clearly Massachusetts contracts, and their interpretation and validity must be determined by the law of Massachusetts. The Missouri Suicide Statute has no extra-territorial force. It has application only to contracts made in Missouri with citizens of Missouri.

The policy involved in the case of *Lukens* v. *International Life Insurance Company*, 269 Mo. 574, 191 S. W. 418, was an Illinois contract. The policy contained a provision that in case of suicide committed within one year from the date of issuance of the policy, the recovery under the policy should be limited to the premiums paid. The insured suicided within one year. The court said, on page 419:

> "The first question challenging attention is whether the contract sued upon is governed by the laws of Missouri or Illinois, and this depends upon where it was finally consummated."

In referring to the Missouri Suicide Statute, the Missouri Supreme Court further said, on page 421 of the opinion:

> "If the contract was an Illinois contract and by reason thereof governed by the laws of that state, as we hold, although the suit is brought in the courts of this state, none of the provisions of the section are applicable to respondent's case nor available to her. The section, when correctly construed, is but an inhibition against making insurance contracts *in this state* and with citizens of this state whereby the insurer is relieved from liability in the event the insured commits suicide. The only right, privilege, or immunity which it denies is the right to contract that in case of suicide the contract obligation shall not be effective, *and this denial or abridgment extends only*

to the citizens of this state and insurers while contracting in this state. * * * Absent statutes to the contrary in the place where the contract is made, this is legitimate subject-matter of contract. If the laws of the state where the contract is made do not deprive the parties of the right to limit liability to death from natural or accidental causes, the right to so contract cannot be questioned, and, when exercised, must be respected" (Emphasis ours).

To the same effect are *Prentiss* v. *Illinois Life Ins. Co.*, 225 S. W. 2d 695, 705; *Parker* v. *Aetna Life Insurance Co.*, 289 Mo. 42, 232 S. W. 708.

It seems clear, therefore that the construction of the insurance contracts in these cases is controlled by Massachusetts law.

III.

The circuit court of appeals held that the provision in the contracts that they "should be considered Missouri contracts and be construed in accordance with the laws of Missouri was perfectly valid and binding and required the Missouri court to apply the Missouri law on the trial of the cases in Missouri." This holding is in conflict with the decisions of the Missouri Supreme Court in Lange v. New York Life Insurance Company, 254 Mo. 488, 498, 162 S. W. 589, and with the decision of this court in Mutual Life Insurance Company v. Hill, 193 U. S. 551, 554, 24 S. Ct. 538.

The final acts necessary to make the contracts in these cases binding contracts having occurred in Massachusetts, these contracts are Massachusetts contracts. If, therefore, the Missouri Suicide Statute is to control in construing the contracts, it must be by virtue of the terms of the contracts and not because the contracts are Missouri contracts.

In *Lange* v. *New York Life Insurance Co.*, 254 Mo. 488, the policy had been lapsed by the company for non-

payment of a premium. The policy contained a provision that delivery and acceptance of the policy should constitute notice of the due date of the premium and expressly waived any further notice required by any statute. The policy also provided:

> "That the contract contained in said policy and in this application shall be construed according to the law of the State of New York, the place of such contract being agreed to be the home office of said company in the city of New York."

In fact, the contract was a New Mexico contract. The plaintiff contended that by virtue of the provision in the contract that the contract should be construed in accordance with the laws of New York, the New York statute, which provided, in substance, that no life insurance company doing business in New York should have power to lapse any policy by reason of nonpayment of the premium without first having given the assured thirty days written or printed notice, controlled, and that such notice not having been given to the assured, the lapsing of the policy by the company was not effective. The company contended that the contract, being in point of fact a New Mexico contract, the laws of New York did not control, and that the specific provision waiving notice of the due date of the premium controlled over the general provision that the contract should be construed according to the laws of New York. Speaking to the point that if the New York statute requiring forfeiture notice was to control in construing the contract, it had to be by virtue of the terms of the contract and not because the contract was a New York contract, the Supreme Court of Missouri said:

> "The application for the policy was made and the policy delivered in the Territory of New Mexico. Such being the fact, it is too well settled to need citation of authority that the contract of insurance was a New Mexico contract. *If, then, the New York statute requiring forfeiture notice is to control in construing the contract, it must be by virtue of the terms*

of the contract of insurance, and not because the policy is a New York contract. This distinction is material" (Emphasis Ours).

There can be no question but that parties contracting in a state may agree that their contract shall be construed under the laws of some other state, provided thereby they do not contract away or annul the public policy of the state where the contract is made. On this proposition, the Supreme Court of Missouri, in the Lange case, continuing the pronouncement above set forth, said:

> "Had the policy been executed in the State of New York, the statute quoted in the above statement would control whether or not referred to in the policy contract *and even though the policy contract said that it would not control; this for the reason that persons contracting within a state are not permitted to contract away or annul the public policy statutes thereof.* On the other hand, if not in contravention of the laws and public policy of the place of contract, the contracting parties may stipulate to the effect that the laws, or a portion of the laws, of a foreign state shall control in construing the contract" (Emphasis Ours).

Of course, the public policy of a state may be found in the judicial records of the state, as well as in its statutes and in its constitution. In the case of *Order of United Commercial Travelers* v. *Meinsen et al.,* 131 F. 2d 176, the Court of Appeals of the Eighth Circuit said:

> "By the public policy of a state is meant 'the law of the state, whether found in the constitution, the statutes, or judicial records.' "

The Missouri court, in the *Lange* case, cited and followed *Mutual Life Insurance Co.* v. *Hill,* 193 U. S. 51, on this proposition. Therefore, in testing the validity of the provisions in these contracts that they should be considered Missouri contracts and construed in accordance with the laws of Missouri, and hence, in determining whether the Missouri Suicide Statute should be read into the contracts

so as to nullify the provisions in the contracts limiting the recovery to the reserve in the event the assured committed suicide, we have to look to the public policy of the State of Massachusetts, the place where these contracts were made.

The Circuit Court of Appeals said "We cannot be concerned with the course the defense of suicide might have taken in trials in Massachusetts on the same insurance contracts." In this, the Circuit Court of Appeals was clearly wrong. Under the decisions of the Missouri courts, the Circuit Court of Appeals was required "to be concerned with the course the defense might have taken in trials in Massachusetts on the same insurance contracts."

Now, there can be no question but that reading the Missouri Suicide Statute into these contracts by construction would "to contract away and annul" the public policy of the State of Massachusetts, as declared by the Supreme Court of that state.

In *Silva* v. *The Fidelity and Casualty Company,* 252 Mass. 328, 330, 147 N. E. 858, the Supreme Court of Massachusetts, speaking through Rugg, Chief Justice, said:

> "Voluntary self destruction is contrary to the common conduct of mankind. It is a crime involving a high degree of moral turpitude."

In *Davis* v. *Supreme Council of Royal Arcanum,* 195 Mass. 402, 81 N. E. 294, plaintiff was a widow and beneficiary of the assured in the policy sued upon. The policy contained no provision in regard to death by suicide. In its answer, the defendant alleged that the assured committed suicide by voluntarily shooting himself while sane, and that by reason of this act, the policy was null and void. The Supreme Court of Massachusetts, on pages 407 and 408 of the official report, said:

> "It is settled upon sound principles, and by a great weight of authority, that, even if an ordinary policy of life insurance contains no provision in regard to death by suicide, there is no liability under it

to the legal representatives of the insured, if his death is intentionally caused by himself when of sound mind. *Hatch* v. *Mutual Ins. Co.*, 120 Mass. 550. *Ritter* v. *New York Ins. Co.*, 169 U. S. 139. *Burt* v. *Union Central Ins. Co.*, 187 U. S. 362. *Shipman* v. *Protected Home Circle*, 174 N. Y. 398. *Supreme Commandery* v. *Ainsworth*, 71 Ala. 436. *Hopkins* v. *Northwestern Life Assurance Co.*, 94 Fed. Rep. 729, 731. *Amicable Society* v. *Bolland*, 4 Bligh (N. S.) 194, 211. * * *

It is an implied condition of the policy that the insured shall not take his own life. *Weber* v. *Knights of Maccabees*, 172 N. Y. 490, 493. In the words of the court in *Shipman* v. *Protected Home Circle*, 174 N. Y. 398, 405:

> 'It is a fundamental, though unexpressed, part of the original contract that the insured should not intentionally cause his own death.'

This is equivalent to saying that as a matter of construction of the contract, there is, in the promise to pay on the death of the insured, an implied exception of death by his own intentional act while he is of sound mind. *It is said in the cases that it would be against public policy to make or enforce a contract to pay one's estate a sum of money on his death by suicide.* See *Ritter* v. *New York Ins. Co.*, 169 U. S. 139, 154. This is a statement, in another form, of the reason for holding that, in a policy that is silent as to suicide, death by suicide is impliedly excepted from the conditions which create a liability" (Emphasis Ours).

In the Davis case, the Court followed the case of *Hatch* v. *Mutual Life Insurance Company*, 120 Mass. 550, 21 Am. Rep. 541. The policy in the Hatch case contained a provision that if the person whose life was thereby insured should die by her own act or hand, whether sane or insane, or in consequence of a duel, or of the violation of the laws of any nation, state or province, then, and in every such case, the policy should be null and void.

The insured died by reason of an illegal operation for abortion, voluntarily submitted to by her. The Supreme Court of Massachusetts, on page 55 of the official report, said:

> "It is therefore established that this voluntary act on her part, condemned alike by the laws of nature and by the laws of all civilized states, and known by her to be dangerous to life, did actually result in death. * * * "We are of opinion that no recovery can be had in this case, because the act on the part of the assured causing death was of such a character that public policy would preclude the defendant from insuring her against its consequences; for we can have no question that a contract to insure a woman against the risk of her dying under or in consequence of an illegal operation for abortion would be contrary to public policy, and could not be enforced in the courts of this Commonwealth. See *Amicable Society* v. *Bolland*, 4 Bligh N. R. 194; *Horn* v. *Anglo-Australian Assurance Co.*, 30 L. J. (N. S.), Ch. 511; *Moore* v. *Woolsey*, 4 E. & B. 243."

To read into these Massachusetts contracts, therefore, the Missouri statute forbidding the defense of suicide and nullifying provisions in the contracts limiting the company's liability to the reserve by virtue of the provisions that the policies should be considered Missouri contracts and construed in accordance with the laws of Missouri is clearly violative of the public policy of the State of Massachusetts and the provisions in the contracts that they should be considered Missouri contracts and construed in accordance with the laws of Missouri are not valid and enforceable, but, on the contrary, are invalid and not enforceable.

IV.

The circuit court of appeals held that "the suicide provision in each of the policies is in manifest conflict with the public policy of Missouri declared in the statute and the district court was not in error in sustaining the motion to strike the same where pleaded as constituting no defense in law to the suits on the policies." This holding is in conflict with the decisions of the Supreme Court of Missouri in the following cases:

Prentiss v. Illinois Life Ins. Co., 225 S. W. 2d 695, 705;

Parker v. Aetna Life Insurance Company, 289 Mo. 42, 232 S. W. 708, 713;

Lukens v. International Life Insurance Company, 269 Mo. 574, 575, 191 S. W. 418;

Lange v. New York Life Insurance Company, 254 Mo. 488, 498, 503, 504, 505, 162 S. W. 589;

and with the decisions of this court in

Mutual Life Insurance Company v. Hill, 193 U. S. 551, 24 S. Ct. 533.

These contracts are Massachusetts contracts. The Missouri Suicide Statute has no application to these cases at all and is not available to the respondents herein unless made so by the provisions in the contracts that they shall be considered and construed as Missouri contracts. To repeat what the Missouri Supreme Court said in *Lukens* v. *International Life Insurance Co., supra*:

> "If the contract was an Illinois contract and by reason thereof governed by the laws of that state, *as we hold*, although the suit is brought in the courts of this state, none of the provisions of the section are applicable to respondent's case nor available to her" (Emphasis ours).

It is obvious, therefore, that the public policy of Missouri, as declared by the Missouri Suicide Statute, is not in these cases at all, and is wholly immaterial.

But, under the decisions of the Supreme Court of Missouri, and of this Court, the provision in these contracts that they shall be considered and construed as Missouri contracts is inoperative for another reason, and here again the holding of the Circuit Court of Appeals that this provision required the application of the Missouri Suicide Statute to these contracts and that the District Court was not in error in sustaining the motion to strike the provision limiting your petitioner's liability under the policies to the reserves is in conflict with the decisions of the Missouri Supreme Court, and of this Court.

Of course, this provision that the contracts shall be considered and construed as Missouri contracts has no force or meaning at all if the contracts are in fact Missouri contracts. Without it, the contracts would be considered Missouri contracts and would be construed in accordance with the Missouri law. The contracts, however, are Massachusetts contracts and if this provision is to be given any effect, it must be because it is one of the terms of the contract and not by virtue of Missouri law. *Lange* v. *New York Life Insurance Company, supra.*

The contracts in these cases each provides:

> "* * * Death within two years from date of policy from suicide, while sane or insane, shall reduce the company's liability hereunder to the amount of the reserve hereon" (Tr. 61, Typical).

This is a specific provision. The provision in the policies

> "Any policy of insurance issued upon this application shall be considered a Missouri contract and its terms shall be construed in accordance with the laws of the State of Missouri unless otherwise specified herein by the applicant."

is a general provision, embracing all of the Missouri law with reference to such contracts of insurance. The spe-

cific provision, under universal rules of construction must control over the general.

In the case of *Lange* v. *New York Life Insurance Company, supra,* the Supreme Court of Missouri, dealing with this subject, on pages 503 and 504 of the official report, said:

> "On the other hand, if not in contravention of the laws and public policy of the place of contract, the contracting parties may stipulate to the effect that the laws, or a portion of the laws, of a foreign State shall control in construing the contract. And when such is the case, it then becomes necessary to look to the contract which the parties themselves have made in order to see what law of the foreign State shall control in the construction of the contract and be considered as a part thereof. Such is the present situation. The policy is a New Mexico contract. By one of its terms it provides that the policy shall be construed as though it were executed in the State of New York. By another of its terms it expressly waives the giving of any notice required by any statute. *The first provision, if not restricted by other terms of the policy, is sufficiently general to embrace all the New York law with reference to such contracts of insurance. The second provision is specific, and conflicts with the general stipulation in that it waives the notice of forfeiture which one of the New York statutes on the subject of insurance requires. One of the general rules of interpretation of contracts is that stipulations with reference to a definite and specific matter will control over a general clause*" (Emphasis ours).

In *Mutual Life Insurance Company* v. *Hill,* 193 U. S. 551, 24 S. Ct. 533, cited and followed by the Missouri Supreme Court in the Lange case, this Court, upon facts substantially similar to those involved in the Lange case, reached the same result, saying on page 558 of the official report:

"Obviously the express stipulation in the policy as to the matter of notice must be held paramount and to that extent limiting the provision of the New York law in reference to notice which was not specially referred to in the contract, and can be invoked only because it is one of the various statutes of New York applicable to insurance policies.

Now, of course, when the general provision in the contracts that they shall be considered and construed as Missouri contracts is so construed as to include the Missouri Suicide Statute in the contracts, it is in conflict with the specific provision limiting the liability of your petitioner under the contracts to the reserves thereon, from which it follows, as the night the day, that the provision that the contracts should be construed as Missouri contracts did not require the Federal Court of Missouri to apply the Missouri Suicide Statute in the trial of the cases in Missouri, and from which it follows, as the night the day, that the District Court did err in sustaining the combined motions to strike and for judgment on the pleadings.

In the cases cited by the Circuit Court of Appeals in its opinion—*Fidelity Loan Securities Co.* v. *Moore,* (Mo. S. Ct.) 280 Mo. 315, 217 S. W. 286; *Hansen* v. *Duvall,* (Mo. S. Ct.) 62 S. W. 2d 732, 739; *Brotherhood of Railway Trainmen* v. *Adams,* 222 Mo. App. 689, 5 S. W. 2d 96, and *Zarnecke* v. *Blue Line Co.,* (Mo. App.) 54 S. W. 2d 772—the principles controlling in these cases were not involved in any way whatsoever. They do not touch upon the question of the invalidity of the provision in the contract that the contracts shall be considered and construed as the contract of some other state than the state where the contract was made, where such provision is violative of the public policy of the state where the contract was made. They do not touch upon the question that where a specific provision of a contract is in conflict with a general provision, the specific provision must control.

V.

The circuit court of appeals held that respondents were entitled to recover Missouri statutory penalties and attorneys' fees for vexatious refusal to pay in each case, in addition to the face of the policy, interest and costs in each case. This holding is in conflict with the decision of the Supreme Court of Missouri in

First National Bank v. Security Mutual Life Insurance Company, 283 Mo. 336, 222 S. W. 832,

and with the decision of the Kansas City Court of Appeals in

Ayers v. Continental Ins. Co., 217 S. W. 550 (not officially reported).

Sec. 6040, R. S. Mo., 1939, the vexatious refusal statute provides:

> "In any action against any insurance company to recover the amount of any loss under a policy of * * * life * * * insurance, if it appear from the evidence that such company has vexatiously refused to pay such loss, the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not to exceed ten per cent on the amount of the loss and a reasonable attorney's fee; * * *"

This statute has no extra-territorial effect. Even in a Missouri contract, it is not a part of the contract and the subject matter for construction. It is a part of the performance of the contract. It imposes a penalty for a vexatious refusal to perform the contract.

In *Ayers* v. *Continental Ins. Co.*, 217 S. W. 550, the Kansas City Court of Appeals said:

> "The payment of an attorney's fee was a part of the performance of the contract, and is governed by the law of Kansas, where the contract was made."

In *First National Bank* v. *Security Mutual Life Insurance Co.*, 222 S. W. 832, 837, 838, 283 Mo. 336, the contract

was a Texas contract and the appellant claimed that error was committed in allowing an attorney's fee. There, the Court said:

> "The appellant claims that error was committed in allowing an attorney's fee in behalf of respondent, for the reason that this is a Texas contract, and no statute of that state authorizing such an allowance was pleaded. In this contention appellant is clearly right. This contract was made in Texas. Respondent is a resident of Texas, paid the premiums there, and demanded performance of the contract in that state. The Texas statute, if any there is on this proposition, is not pleaded. We do not take judicial notice of the statutes of a sister state, and if such a statute as would authorize the allowance of an attorney's fee exists in that state, it should have been pleaded and proven in the same manner as any other fact. *Fidelity Loan Securities Co.* v. *Moore*, (Mo.) 217 S. W. 286, l. c. 289. The allowance of an attorney's fee relates to the right, and not to the remedy. No attorney's fee should have been allowed."

Since the contracts were made in Massachusetts, and were to be performed in Massachusetts, they are Massachusetts contracts, and the statutory penalties and attorneys' fees were not allowable under the law of Missouri in either case.

Wherefore, petitioner respectfully prays that a writ of certiorari issue in each of said cases.

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(22)

JAN 10 1944
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1943.

Nos. 548 and 549.

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY, A CORPORATION, PETITIONER,

VS.

MARGUERITE W. KEYES, RESPONDENT.

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY, A CORPORATION, PETITIONER,

VS.

MARGUERITE KEYES, INCORPORATED, RESPONDENT.

BRIEF FOR RESPONDENTS MARGUERITE W. KEYES AND MARGUERITE KEYES, INCORPORATED, IN OPPOSITION TO PETITION FOR CERTIORARI.

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A.

OPINION DELIVERED IN THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit, The Columbian National Life Insurance Company vs. Marguerite W. Keyes and The Co-

lumbian National Life Insurance Company vs. Marguerite Keyes, Incorporated (not yet officially reported), is reported in 138 F. 2d 382, 385 (T. 281-287).

B.

JURISDICTION.

The jurisdiction of this Court is invoked by Petitioners under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 938 (Title 28, U. S. C. A., Sec. 347), and under the same Act, Ch. 229, Sec. 8, 43 Stat. 940 (Title 28, U. S. C. A., Sec. 350), and under *Ruhlin* v. *New York Life Insurance Company*, 304 U. S. 302, 58 S. Ct. 860, 82 L. Ed. 1920. The date of the judgment of the United States Circuit Court of Appeals for the Eighth Circuit sought to be reviewed was October 25, 1943 (T. 287, 289). Motion for Rehearing was overruled and denied November 16, 1943 (T. 307).

C.

STATEMENT OF THE CASE.

The Petitioner, The Columbian National Life Insurance Company, has been continuously licensed to do business in the State of Missouri since the year 1904 (T. 103). On October 2, 1939, the Insurance Department of the State of Missouri, through its then Superintendent, Ray B. Lucas, addressed a communication to all foreign insurance companies licensed in Missouri (including Petitioner) complaining of the practice of certain foreign insurance companies of using so-called "binding receipts" in order to make foreign contracts out of insurance contracts, the applications for which had been taken in Missouri and the policy thereon delivered in Missouri, to the detriment of Missouri policyholders. The Insurance Department requested that said foreign insurance companies (including

Petitioner) state whether or not they had been following the practice, and to indicate their intentions in that respect in the future. The Insurance Department warned that, if the advance collection of premiums was to be used to the disadvantage of the insurance applicant, then the Department would insist either that no premiums be collected before delivery of the policy, or that the policy definitely state that it is subject to the laws of Missouri (T. 117, 118). Said communication of the Missouri Insurance Department went into the hands of Mr. Frederick H. Nash, General Counsel and Vice President of Petitioner (T. 114, 115). On October 21, 1939, by letter, Petitioner's General Counsel wrote the Superintendent of Insurance of Missouri as follows (T. 120):

> "Your circular letter of October 2nd to foreign life insurance companies licensed in Missouri is acknowledged.
>
> Although I have been General Counsel of this company since 1907, I am unable to recall or find a case in which this company has in Missouri contended that a life policy issued and delivered in Missouri was not a contract subject to the laws of the State of Missouri.
>
> In respect to the future, I shall, of course, be guided by the decisions of the state courts of Missouri, of the Eighth Federal Circuit, and of the Supreme Court of the United States."

Thereafter, and under date of February 15, 1940, the Missouri Insurance Department ordered all foreign insurance companies licensed in the State of Missouri, effective March 15, 1940, to include in all applications for life insurance policies filed and solicited in the State of Missouri, the following (T. 112):

> "Any policy of insurance issued upon this application shall be considered a Missouri contract and its terms shall be construed in accordance with the laws of the State of Missouri unless otherwise specified herein by the applicant."

On March 4, 1940, the Petitioner, through its Actuary, wrote the Superintendent of Insurance of Missouri as follows (T. 113):

> "In accordance with your bulletin of February 15, we are filing a copy of our application with a rubber stamp impression of the desired statement. If this meets with your approval, we will use this stamp on all present forms of application hereafter used in Missouri."

Thereafter, and on October 29, 1940, George T. Keyes, the husband of Respondent Marguerite W. Keyes, signed a written application for a $25,000 policy of five-year term insurance, in Kansas City, Missouri (T. 65), and on the 30th day of October, 1940, pursuant to said application for insurance, was examined by the medical examiner of the Petitioner Insurance Company in Kansas City, Missouri (T. 65), and as of October 28, 1940, the Petitioner issued its policy No. 261084 on the life of said George T. Keyes in the sum of $25,000, Marguerite W. Keyes, wife of the Insured, being named as beneficiary (T. 57-65). Said policy of insurance was physically delivered to the insured in Kansas City, Missouri, by Mr. John Mullane, the General Agent of the Petitioner (T. 143). The Insured, at the time of the application, paid $135.75 on the first yearly premium of $512 (T. 65).

Thereafter, and on June 16, 1941, George T. Keyes, as the proposed Insured, signed a medical statement and was examined by Dr. Glen C. Carbaugh, Petitioner's medical examiner, respecting further insurance, and on June 17, 1941, he, as the proposed Insured, and Markay, Inc., as applicant for the insurance, signed an application for a policy of insurance of the Petitioner in the face amount of $10,000 all in Kansas City, Missouri (T. 217), and under date of the 16th day of June, 1941, the Petitioner issued its insurance policy pursuant to said application (T. 205-217) and said insurance policy bearing No. 264444

with Markay, Inc., a Missouri corporation, as the designated beneficiary was physically delivered to the Insured in Kansas City, Missouri, by Mr. John Mullane, the General Agent of the Petitioner (T. 143). The Insured, at the time of signing the application, paid the sum of $61.31 of the yearly premium of $231.40 (T. 217).

Both insurance policies so issued and delivered by the Petitioner had printed in bold type in each application the following provision (T. 65, 217):

> "Any policy of insurance issued upon this application shall be considered a Missouri contract and its terms shall be construed in accordance with the laws of the state of Missouri unless otherwise specified herein by the applicant."

Immediately below the above quoted provision in each application, and directly over the signature of the Insured appeared the following provision:

> "3. That acceptance of any policy issued on this application shall operate as a ratification of any changes or amendments noted by the company in the space entitled 'Corrections and Amendments.'"

In each of the above policies under the general heading "Benefits and Provisions" under numbered Paragraph 6 appear the following policy provision (T. 61, 209):

> "Protection by Statute. This policy and the application therefor constitute the entire contract between the parties and all statements made by the Insured in the application shall, in the absence of fraud, be deemed representations and not warranties, *and no statement shall avoid the policy or be used in defence to a claim under it unless contained in the written application and a copy of the same attached thereto*" (Italics Ours).

Both policies of insurance were in full force and effect on the 10th day of April, 1942, the day of the death of the Insured, George T. Keyes. The Insured died as the

result of a gunshot wound received by him on the 23rd day of March, 1942.

Under date of April 17, 1942, due proof of the death of the Insured under each policy was furnished the Petitioner on the company's forms as furnished the beneficiaries by the General Agent of the company (T. 146). Thereafter, and under date of May 7, 1942, written demand was made upon the Petitioner for the payment in full of each of said life policies (T. 146, 147). Thereafter, and on May 16, 1942, written demand was again made on the Petitioner, by Registered Mail, for the payment in full of the proceeds under each of said policies. Thereafter, and under date of May 21, 1942, Mr. Frederick H. Nash as Vice President and General Counsel of the Insurer Petitioner advised in writing that he had "advised the company to resist payment of both the life policies and the accident policy" (T. 149). Thereafter, and on May 28, 1942, your Respondents filed suits on each of the above insurance policies in the District Court of the United States for the Western Division, Western District of Missouri at Kansas City.

Your Respondents never knew and were never advised by the Petitioner, until the Petitioner filed answer to Respondents' petitions on the policies, why the Petitioner was resisting payment and was refusing to pay the proceeds of the life insurance to the Beneficiary Respondents.

The original, first amended, and second amended answers filed by the Petitioner to Respondents' petitions in the Trial Court below were identical in wording and the Petitioner's original answer to Respondents' petition on the $25,000 policy, filed by the Petitioner on July 1, 1942 (T. 69-74 inclusive), and its answer to Respondent's petition in the $10,000 suit as filed on the same date (T. 221-226 inclusive), each admitted all the allegations in Respondents' petitions except the allegation that the policy was made, executed and delivered to the Insured in

the State of Missouri and said original answers set up the following legal defenses:

(1) That the contract of insurance was a Massachusetts contract because of an alleged binding premium receipt; and that the provision inserted in the policies providing that the contract should be a Missouri contract and construed under the laws of the State of Missouri was void because "defendant avers that said stamped provision on said application was not incorporated in said application as the free act and deed of this Defendant but Defendant was wrongfully compelled and coerced to stamp said provision on said application by the Superintendent of Insurance of the State of Missouri."

(2) That the settled public policy of the State of Massachusetts holds that suicide is a wicked crime and that the policy being a Massachusetts contract, the provision limiting the company's liability to the amount of the reserve because of death from suicide within two years of the date of the policy, bars Plaintiff from recovering more than the amount of said reserve.

(3) That the stamped provision in the policy providing that the contract should be considered a Missouri contract and construable under the laws of Missouri is void as being contrary to and in conflict with the law and public policy of the State of Massachusetts.

(4) That Sec. 5851, R. S. Mo., 1939, the Missouri Suicide Statute, is unconstitutional and void in that it violates Section 28, Article IV, of the Constitution of Missouri for 1875, as not being clearly expressed in the title of the act.

Thereafter Respondents filed identical Motions to Strike out Parts of Defendant's Answer (the foregoing alleged legal defenses) combined with Respondents' Motions for Judgment on the Pleadings (T. 74-79 inclusive and T. 221-226 inclusive).

Thereafter, Petitioner in each case filed their first amended and second amended answers setting up the same legal defenses as in its original answers with the exception that Petitioner abandoned its claim that it had inserted the Missouri construction provision in the applications for insurance because it was wrongfully compelled and coerced to do so by the Superintendent of Insurance of the State of Missouri.

On December 11, 1942, Petitioner filed its second amended answers in each of said cases (T. 91-96) and Respondents refiled Motions to Strike out the Legal Defenses in Petitioner's second amended answers, and for Judgment on the Pleadings, and on January 27, 1943, the District Court entered an Order and Judgment in each case, sustaining Respondents' combined motion in each case and for judgment on the pleadings and adjudging that the Plaintiff (Respondent) recover from the Defendant (Petitioner) in the case of *Marguerite W. Keyes* v. *The Columbian National Life Insurance Company*, the sum of $25,000 with interest thereon, and the further sum of $2,500 as a penalty for vexatious refusal to pay, and the further sum of $5,000 as and for attorneys' fees (T. pp. 27-28), and adjudging in the case of *Marguerite Keyes, Incorporated*, v. *The Columbian National Life Insurance Company*, that the Plaintiff (Respondent) have and recover from the Defendant (Petitioner) the sum of $10,000 with interest thereon, and the further sum of $1,000 as a penalty for vexatious refusal to pay, and for the further sum of $2,000 as and for attorneys' fees (T. 30).

Prior to the filing of Petitioner's second amended answers and prior to August 28, 1942, the attorneys for the Petitioner Insurance Company appeared before the Superintendent of Insurance of Missouri and contended that the Actuary of the company did not have authority to agree for the company to insert the rubber stamp provision for

Missouri construction, in the company's applications for life policies (T. 122). As a result of the hearing before the Insurance Commissioner, Mr. F. H. Nash as Vice President and General Counsel of the Petitioner wired the Superintendent of Insurance of Missouri (T. 126) that,

> "I AM NOW ASSURED OF A QUORUM OF THE EXECUTIVE COMMITTEE NEXT FRIDAY, AND THAT COMMITTEE WILL VOTE TO AFFIRM. I HAVE ASKED UNDERWRITERS NOT TO RELEASE MISSOURI POLICIES UNTIL I GIVE PERMISSION."

Thereafter, and on August 28, 1942, the General Counsel of Petitioner wrote the Superintendent of Insurance of Missouri enclosing a copy of a resolution of the Executive Committee approving the acts of the company's Actuary from March 4, 1940, on, with respect to the rubber stamp Missouri construction provision in the policies (T. 127, 128, 129).

On December 28, 1942, trials were had in the District Court on the issue of damages for vexatious delay and attorneys' fees, and on January 18, 1943, the Trial Court handed down and entered its finding of fact and conclusion of law in both cases (T. 9-19 inclusive) and on the same day entered judgment in both cases in favor of the Plaintiff Respondent (T. 19, 20 and 21, 22). Thereafter, and on January 27, 1943, the Defendant filed in each case a Motion to set aside Judgment and Order and submitting a form of judgment which the Defendant assertedly believed correctly recited and set forth the action and judgment of the Court in each cause (T. 22-25 inclusive). Said motion was sustained by agreement between parties and new judgments immediately were entered on the form submitted by the Petitioner (T. 27, 28, 30).

The Petitioner appealed from the judgment of the Trial Court, to the United States Circuit Court of Appeals for the Eighth Circuit where the judgment of the Trial Court was affirmed upon condition that Respondent file

remittitur of $2,500 on the $10,000 judgment for attorneys' fees. The Trial Court's memorandum opinion appears at T. 267 to 276 inclusive. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit appears at T. 281 to 287 inclusive. The judgments entered in the Eighth Circuit Court of Appeals appear at T. 287 to 290 inclusive. On November 16, 1943, the United States Circuit Court of Appeals denied Petitioner's Petition for Rehearing (T. 307).

D.

QUESTIONS PRESENTED.

While the questions presented numbering I to IX inclusive at pages 7 to 11 inclusive of Petitioner's petition for writ of certiorari do not present any federal, constitutional or conflict question for this Honorable Court's consideration, but only raises questions purely local, the Petitioner, in its accompanying brief and argument under the heading entitled "Reasons Relied Upon for the Allowance of the Writ" vaguely but not clearly raises the following questions:

(1) The Circuit Court of Appeals held "We find no merit in the plea that construction of the insurance contracts was controlled by Massachusetts law" and such holding is in conflict with certain State Supreme and State Appeals decisions and with *Mutual Life Insurance Company of New York* v. *Liebing*, 259 U. S. 209, 42 S. Ct. 467, 468.

(2) The Circuit Court of Appeals held that the provision in the insurance contracts that they "should be considered Missouri contracts and be construed in accordance with the laws of Missouri was perfectly valid and binding and required the Missouri Court to apply the Missouri law on the trial of the cases in Missouri." Such holding is in conflict with the decision of the Missouri Supreme Court in *Lange* v. *New York Life Insurance Company*, 254 Mo. 488, 498, 162 S. W. 589, and with the decision of this Court in *Mutual*

Life Insurance Company v. *Hill*, 193 U. S. 551, 554, 24 S. Ct. 538.

(3) The Circuit Court of Appeals held that "The suicide provision in each of the policies is in manifest conflict with the public policy of Missouri declared in the Statute and the District Court was in error in sustaining the motion to strike the same where pleaded as constituting no defense in law to the suits on the policies." This holding is in conflict with certain decisions of the Supreme Court of Missouri and with *Mutual Life Insurance Company* v. *Hill*, 193 U. S. 551, 24 S. Ct. 538.

(4) The Circuit Court of Appeals held that Respondents were entitled to recover Missouri statutory penalties and attorneys' fees for vexatious refusal to pay in each case, in addition to the face of the policy, interest and costs in each case. This holding is in conflict with the decision of the Supreme Court of Missouri in *First National Bank* v. *Security Mutual Life Insurance Company*, 283 Mo. 336, 222 S. W. 832, and with the decision of the Kansas City Court of Appeals in *Ayers* v. *Continental Ins. Co.*, 217 S. W. 550 (not officially reported).

E.

SUMMARY OF THE ARGUMENT.

POINT I.

The petition for the writ of certiorari does not conform to Rule 38, Paragraph 2, of this Court for the reason that the petition fails to contain a statement, particularly disclosing the basis upon which it is contended by Petitioner that this Court has jurisdiction (Rule 12, Paragraph 1).

POINT II.

The United States Circuit Court of Appeals properly ruled that the insurance contracts were Missouri contracts and construable in accordance with the laws of the State

of Missouri and such ruling follows and is in accordance with the decisions of the Supreme Court of the United States, and is not in conflict with any controlling decision of this Court.

POINT III.

The United States Circuit Court of Appeals properly ruled that the suicide provision in each of said contracts of insurance were contrary to the expressed public policy of the State of Missouri and could not be enforced in a Federal Court sitting in the State of Missouri, and such ruling follows and is in accordance with the decisions of the Supreme Court of the United States, and is not in conflict with any controlling decision of this Court.

POINT IV.

The question of whether or not the contracts of insurance were Missouri contracts or Massachusetts contracts is not a substantial question affecting the result in these cases because the judgment of the Court of Appeals would have been the same and against the Petitioner in either event, and the judgment would be and is supported by and in accordance with controlling decisions of the Supreme Court of the United States, and would not be in conflict with any such controlling decisions.

POINT V.

There was no federal, constitutional or conflict question involved in the decision of the United States Court of Appeals and this cause is not properly reviewable by this Honorable Court.

F.

ARGUMENT.

POINT I.

The petition for writ of certiorari does not conform to Paragraph 2 of Rule 38 of this Court, in that it fails to contain a statement, particularly disclosing the basis upon which it is contended that this Court has jurisdiction as provided in Paragraph 1 of Rule 12 of this Court.

The petition does not show, by statement, that the nature of the case and the rulings of the Court were such as to bring the case within the jurisdictional provisions relied upon, and does not cite cases to sustain the jurisdiction of this Court. It does not include a statement of the grounds upon which it is contended the questions involved are substantial.

This Honorable Court has repeatedly held that a failure on the part of the Petitioner to comply with the foregoing requirements of this Court's rules will be a sufficient reason for denying the petition. In *Furness* v. *Withy & Company, Limited,* v. *Yang-tsze Insurance Association, Limited, et al.,* 242 U. S. 430, 37 S. Ct. 141, 61 L. Ed. 409, this Court at S. Ct. l. c. 142 said:

> "Such petitions go first to every member of the Court for examination, and are then separately considered in conference. This duty must be promptly discharged. We are not aided by oral arguments, and necessarily rely in an especial way upon petitions, replies, and supporting briefs. Unless these are carefully prepared, contain *appropriate* references to the record, and present with *studied accuracy, brevity, and clearness* whatever is essential to ready and adequate understanding of points requiring our attention, the rights of interested parties may be prejudiced and the Court will be impeded in its efforts properly to dispose of the causes which constantly crowd its docket."

POINT II.

The United States Circuit Court of Appeals properly ruled that the insurance contracts were Missouri contracts and construable in accordance with the laws of the State of Missouri.

The policies expressly provided that the policy and the application therefor constituted the entire contract between the parties and that the policies "shall be considered a Missouri contract and its terms shall be construed in accordance with the laws of the State of Missouri * * *." The applications for the insurance were signed by the Insured in Kansas City, Missouri. The Insured was medically examined for the insurance in Kansas City, Missouri, by a Kansas City physician. The policies were physically delivered to the insureds by the General Agent of the Petitioner Insurance Company. The last act necessary to complete the contract of insurance was not the approval by the insurance company in Boston, pursuant to the alleged binding receipt, but was, in fact, the acceptance of the policy contract by the Insured who, by such acceptance, ratified the changes and amendments noted by the company in the space entitled "Corrections and Amendments" in the application which formed a part of the contract. In each contract under "Corrections and Amendments" appeared the Missouri Construction Amendment requiring that the policies be considered Missouri contracts and construable under its laws.

In the case of *Seeman et al.* v. *Philadelphia Warehouse Co.*, 274 U. S. 403, 47 S. Ct. 626, 627, 71 L. Ed. 1123, this Court held that a Pennsylvania corporation might legitimately lend funds outside the state and stipulate for repayment in Pennsylvania in accordance with its laws.

The Supreme Court of the State of Missouri *En Banc*, affirmed this same rule of contract in the case of *Fidelity Loans Security Co.* v. *Moore*, 280 Mo. 315, 217 S. W. 286,

where at S. W. l. c. 288 and 289, the Court in its opinion said:

> "But, to the real point of the case: The parties had the right to contract, and to agree in such contract that the laws of Texas should govern their contract. This intention of the parties will be carried out by the courts, when they are called upon to enforce the contract. In other words, it is a vital part of the contract. The rule is thus stated in 9 Cyc., pp. 665 and 666:
>
> > 'Where the parties have expressly provided that the contract shall be governed by the law of a particular country, this intention will as a rule be carried out by the courts. Thus where two persons make a contract in England, but by its very terms it is provided that it shall be governed by the laws of Scotland, the law of Scotland then becomes the proper law of the contract, and the law by which it is to be interpreted and its legality decided. Parties may substitute the laws of another place or country than that where the contract is entered into, both in relation to the legality and extent of the original obligation, and in relation to the respective rights of the parties, for a breach or violation of its terms. This is part of the *jus gentium*, and is enforced *ex comitate*, when the enforcement of the contract is sought in the courts of a country governed by a different rule than the local or adopted law of that contract.' "

The United States Circuit Court of Appeals for the Eighth Circuit recognized this firmly established rule of contract in the case of *Federal Security Co.* v. *Minneapolis Steel & Machinery Co.*, 17 F. 2d 242, where the Court in its opinion at l. c. 245, held:

> "The law of the place where the contract is made governs its nature, obligation, and interpretation *unless it appears that the parties when entering into the contract intended to be bound by the law of some other state*" (Italics ours).

See also *Hansen et al.* v. *Duvall et al.*, 62 S. W. 2d 732, l. c. 739, where the Supreme Court of Missouri cites and follows the Supreme Court of the United States in *Seeman* v. *Philadelphia Warehouse Co., supra.*

The Petitioner reaffirmed the Missouri Construction Provision in its contracts and thus agreed that these contracts would be construed under the laws of the State of Missouri, after the filing of its answers and before judgment in the lower Court, by resolution of its Executive Committee, as furnished the Superintendent of Insurance of Missouri.

POINT III.

The United States Circuit Court of Appeals properly ruled that the suicide provision in each of said contracts of insurance were contrary to the expressed public policy of the State of Missouri and could not be enforced in a Federal Court sitting in the State of Missouri.

Section 5851, Revised Statutes of Missouri, 1939, provides:

> "Suicide no defense, when—In all suits upon policies of insurance on life hereafter issued by any company doing business in this state, to a citizen in this State, it shall be no defense that the Insured committed suicide * * * and any stipulation in the policy to the contrary shall be void."

The foregoing Suicide Statute of Missouri has been on the statute books continuously since its first enactment, May 24, 1879, and it has been held constitutional in the face of almost every conceivable attack. It was upheld by the Supreme Court of the United States as early as the year 1907 in the case of *Whitfield ex rel. Hadley* v. *Aetna Life Ins. Co. of Hartford*, 205 U. S. 489, 27 S. Ct. 578, where, concerning the statute, Mr. Justice Harlan, in handing down the opinion of the Court at S. Ct. l. c. 579 said:

> "That the Statute is a legitimate exertion of power by the state can not be successfully disputed. * * * An insurance company is not bound to make a contract which is attended by the results indicated by the statute in question. If it does business at all in the state, it must do so subject to such valid regulations as the state may choose to adopt. Even if the statute in question could be fairly regarded by the Court as inconsistent with public policy or sound morality, it can not, for that reason alone, be disregarded; *for it is the province of the state, by its legislature, to adopt such a policy as it deems best,* provided it does not, in so doing, come into conflict with the Constitution of the state or the Constitution of the United States. There is no such conflict here."

And again at S. Ct. l. c. 580, the Court said:

> "The manifest purpose of the statute was to make all inquiry as to suicide wholly immaterial, except where the insured contemplated suicide at the time he applied for his policy. *Any contract inconsistent with the statute must be held void.* * * * The statute is mandatory and obligatory alike on the insurance company and the assured. Its very object was to prohibit and annul such stipulations in policies, and it cannot be waived or abrogated by any form of contract or by any device whatever. The legislative will, when expressed in the peremptory terms of this statute, is paramount and absolute, and cannot be varied or waived by the private conventions of the parties" (Italics ours).

The Missouri Suicide Statute was last held to be constitutional by the Supreme Court of Missouri in the case of *Edwards* v. *Business Men's Assur. Assn. of America*, 168 S. W. 2d 82.

That the Missouri Suicide Statute *supra* expresses the public policy of the State of Missouri cannot be seriously questioned, and it cannot be questioned but that the provision in the insurance contracts reading "Death within two years from date of policy from suicide, while sane or

insane, shall reduce the company's liability hereunder to the amount of the reserve hereon," is directly contrary to and in conflict with the public policy of the State of Missouri as expressed in the Missouri Suicide Statute. It is now settled that the Federal Courts in diversity of citizenship cases are governed by the conflict of laws rules of the courts of the state in which they sit. See *Griffin* v. *McCoach*, 313 U. S. 498, 503, 61 S. Ct. 1023, 1025, 85 L. Ed. 1481, 134 A. L. R. 1462.

In Missouri the law of another state, or a contract made in another state, and valid under its laws, will be enforced by the courts unless to do so would be contrary to the public policy of the state. See *Burg* v. *Knox*, 334 Mo. 329, 67 S. W. 2d 96, 100.

The Supreme Court of the United States in *Griffin* v. *McCoach supra*, at S. Ct. l. c. 1027 said:

> "It is 'rudimentary' that a state 'will not lend the aid of its Courts to enforce a contract founded upon a foreign law where to do so would be repugnant to good morals, would lead to disturbance and disorganization of the local municipal law, or, in other words, violate the public policy of the state where the enforcement of the foreign contract is sought,' *Bond* v. *Hume*, 243 U. S. 21; 37 S. Ct. 366; 368, 61 L. Ed. 565" * * *. "It is for the state to say whether a contract contrary to such a statute or rule of law is so offensive to its view of public welfare as to require its Courts to close their doors to its enforcement."

And again at S. Ct. l. c. 1027, the Supreme Court said:

> "Where this Court has required the state of the forum to apply the foreign law under the full faith and credit clause or under the Fourteenth Amendment it has recognized that a state is not required to enforce a law obnoxious to its public policy."

From the foregoing, it is crystal clear that the suicide provision in each of the insurance contracts was in

direct conflict with the public policy of the State of Missouri, and the Federal Court of Appeals in its opinion properly ruled the question. The ruling is obviously in line with and not in conflict with the decisions of the Supreme Court of Missouri or the Supreme Court of the United States.

POINT IV.

The question of whether or not the contracts of insurance were Missouri or Massachusetts contracts, is not a substantial question affecting the result in these cases.

The Court of Appeals in its opinion in affirming the judgment of the Trial Court in favor of these Respondents, incidentally held that the contracts of insurance were Missouri contracts. We submit the contracts are Missouri contracts, however, the result would have been the same if the Court of Appeals had held that the contracts were Massachusetts contracts because the defense of suicide as raised by the petitioner was not available to it in the face of the public policy of the State of Missouri, and particularly it could not be asserted in a Federal Court sitting in the State of Missouri as in the instant case, in the light of the decisions and cases cited under Point III of this brief. In the interest of brevity we do not here recite said cases.

POINT V.

There was no federal, constitutional or conflict question involved in the decision of the United States Circuit Court of Appeals.

The cases cited by the Petitioner in its brief in support of its petition for certiorari are in no sense in conflict with the ruling of the Federal Court of Appeals in this proceeding. Petitioner has insisted that the so-called "binding receipt" cases and decisions of the Supreme Court of Missouri and Appellate Courts are applicable to the cases at Bar. They are not in point with the

cases at Bar because the facts disclose that the acts of the Petitioner in providing in its contracts of insurance that the contracts would be Missouri contracts and construable under the laws of the State of Missouri, was for the express purpose of forever waiving the right to claim the contracts were anything other than Missouri contracts and Petitioner should not now be heard to claim otherwise. In as much as this is the first recorded proceeding on contracts of insurance containing such a Missouri construction provision, and the previous decisions on so-called binding receipt insurance contracts did not consider such a contract provision, it cannot reasonably be contended by Petitioner that those cases are in point or in conflict with the case at Bar.

CONCLUSION.

For all the foregoing reasons we respectfully submit that the Petition for Writ of Certiorari should be denied for failure to comply with the rules of this Court; for the reason that no substantial federal question is properly before this Court; and for the reason that the decision of the lower Court is sound and in harmony with and not in conflict with the opinions of the Supreme Court of Missouri and of this Honorable Court.

Respectfully submitted,

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